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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LUIS CERVANTES PRADO, Defendant and Appellant.	H034138 (Santa Clara County Super. Ct. No. 208771)

Defendant Luis Cervantes Prado was convicted after jury trial of two counts of aggravated sexual assault of a child under 14 by rape (§§ 269, 261, subd. (a)(2)).[1] The victim of the offenses was defendant's daughter. The jury found true allegations that defendant had a prior felony conviction for lewd conduct with a child under 14. (§§ 288, subd. (a), 667, subds. (a), (b)-(i), 1170.12.) The victim of the prior offense was defendant's step-daughter. The court sentenced defendant to prison for 60 years to life.

On appeal, defendant contends that there is insufficient evidence to support a finding that the current offenses were committed by means of force or duress, and that the trial court erred in failing to instruct the jury on the lesser included offense of battery. As we disagree with defendant's contentions, we will affirm the judgment.

[1] All further statutory references are to the Penal Code.

BACKGROUND

Defendant was charged by information filed October 19, 1998, with two counts of aggravated sexual assault of a child under 14 by rape (§§ 269, 261, subd. (a)(2); counts 1 and 2), and one count of failing to register as a sex offender (former § 290, subd. (g)(2)). The information further alleged that defendant had a prior serious felony conviction for lewd conduct on a child under 14 that also constituted a strike. (§§ 667, subds. (a), (b)-(i), 1170.12.) Defendant was present when the trial court heard motions in limine on April 14, 1999, but he did not appear for jury selection on April 19, 1999, and a bench warrant issued for his arrest. He was arrested on the bench warrant in Phoenix, Arizona on December 8, 2007. Trial began anew with motions in limine on October 8, 2008.

The Prosecution's Case

When Jennifer[2] met defendant in January 1990, she had a daughter, D., who was nine years old. Defendant and Jennifer moved in together in the beginning of 1991, and their daughter P. was born in December 1991. In June 1993, at the end of the day that the family moved into Jennifer's mother's home, Jennifer asked defendant to go downstairs to check on D. and D.'s boyfriend who had helped them during the move. About five or ten minutes after defendant left to do so, Jennifer called downstairs to ask defendant about D. Defendant yelled back that D. was fine, and then he returned upstairs. Shortly thereafter, D. came upstairs, crying, and told Jennifer that defendant had touched her. Jennifer confronted defendant, who denied doing anything. Jennifer's brothers, who were present, called the police and asked defendant to leave.

Defendant pleaded guilty to violating section 288, subdivision (a), lewd conduct, as a result of the incident involving D.. Probation Officer Debora Granja-Enis spoke to defendant in order to prepare a presentence report for the case. She testified at this trial

[2] We will refer to some of the witnesses by only their first name or an initial in order to protect their privacy.

that defendant admitted his culpability to her. Defendant told her that he had consumed 10 beers during the move and was intoxicated. He found D. on the sofa, he thought she was asleep, and he put his finger and penis in her vagina.

Dr. Douglas Harper, a psychiatrist, evaluated defendant for a section 288.1 report in D.'s case. He met with defendant on May 7, 1994 in the jail. Defendant related the details of the incident with D. He said that he was drunk when he found D. on the couch. He caressed her breasts, pulled her pants down, and rubbed his penis against the outside of her vagina. During the incident, D.'s boyfriend was asleep in the same room and Jennifer was upstairs.

Jennifer decided to give defendant another chance and she married him while he was in custody. Defendant moved back in with Jennifer and P. when he was released from custody, and D. went to live with her father.[3]

Jennifer and defendant's son was born in July 1997. Jennifer testified that during and after her pregnancy, she and defendant had little sexual contact. Jennifer slept in the bedroom with the children and defendant slept on the living room sofa or on the bedroom floor. Jennifer's mother took care of the children during the day while Jennifer worked.[4] When defendant had no roofing work, he was also home during the day.

In April 1998, P. disclosed to her aunt and uncle that defendant had molested her. San Jose Police Officer Kyle Johnson spoke to P. on April 19, 1998. P. pointed to her crotch area and told Officer Johnson that defendant would come into the room while others were sleeping, close the blinds, pull down her shorts, and put his "stick" inside of her. P. was unsure how many times this had occurred.

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[3] D. died in July 2004.

[4] Jennifer's mother died in September 2006.

San Jose Police Detective Douglas Rock interviewed six-year-old P. on April 20, 1998. The interview was videotaped, and a DVD of it was played for the jury. During the interview, when asked if anybody had ever touched her "where you go to the bathroom," P. responded, "Yeah. . . . My father." When asked to tell how her father "does that," P. responded, "I lay down, and then he goes on top of me." "And then, umm, sometimes, . . . takes my pants off or shorts off." While pointing to the front of the crotch area of a picture of a female, P. said, "him do, him, him umm, him umm, put his body in, in uh, umm, and right there," "It hurts." "It feels like is, is umm . . . like, a, is ripping inside." P. said that this happened "maybe, like ten times," always during the daytime in the living room while her mother was working. Defendant first touched her this way when her mother was pregnant and he continued to touch her this way after the baby was born. P. said that she did not know when the last time it happened, but she said that he stopped when she "turned to six." She said that she never said anything to her father during the incidents. She told her grandmother about them, but she forgot what her grandmother said. She told D. that her father takes her shorts off, and D. told her not to let him do it again. P. said that she told her mother everything on the day of the interview.

P. was taken to the hospital for an examination on April 22, 1998. Marylou Ritter, a SART examiner, talked to Officer Rock about P.'s disclosures, but Ritter did not ask P. about them. During a physical examination of P., Ritter did not find any definite physical evidence of penetrating trauma. However, the absence of evidence of penetrating trauma does out rule out the possibility of sexual contact.

P. testified that defendant began molesting her while Jennifer was pregnant with P.'s brother, and continued to do so until P. disclosed the conduct to her aunt and uncle when her brother was about six months old. P. testified that defendant molested her about four times while Jennifer was pregnant. Defendant pulled down her pants and his pants, put a sandwich bag over his penis, and put his penis in her vagina. Each time he

did this, it hurt her. She cried and told him that it hurt, but he did not stop. He told her not to tell anyone, especially not her mother. He did not say what he would do to her if she did tell, but this scared P. and caused her to be afraid of defendant. After P.'s brother was born, defendant molested her about five times. All of the incidents occurred in the daytime on the floor in the living room when other family members were in other parts of the house. Defendant did not ask her to touch his penis and he did not touch her chest or her butt. P. did not learn that defendant had been convicted of molesting D. until after D. died.

The Defense Case

Pablo Prado, defendant's brother, often visited defendant's family. He thought defendant's interaction with P. was normal; Pablo did not see anything he believed to be inappropriate. Nobody in Pablo's family was concerned that defendant might inappropriately touch children in the family. Even though Pablo was aware of D.'s accusations against defendant, when Pablo heard of P.'s allegations, he thought that they were impossible.

Maria Prado, who is married to Pablo, met defendant over 16 years before testifying at trial. Maria socialized with defendant's family at family gatherings after defendant was released from custody. She remembers that defendant played with P. like any normal father would, and that P. was always happy. Maria did not see anything she thought was inappropriate between defendant and P., or between defendant and Maria's family members. She was shocked to learn of P.'s allegations.

Defendant testified in his own defense. He testified that he was drinking beer the day in 1993 that the family moved into Jennifer's mother's home. After he and Jennifer retired for the evening, she asked him to check on D. He was drunk when he went downstairs. He does not remember exactly what he did, but he admits the accusations made here. He denied ever talking to Probation Officer Granja-Enis. Dr. Harper read him the accusations and he admitted them.

While he was in jail, he and Jennifer got married, and he moved back in with her and P. when he was released from custody. He worked for a roofing company, but did not work when it was raining. Jennifer's mother took care of P. during the day. He was never alone with P.

Defendant denied raping P. or placing his penis inside P. either before or after his son was born. He also denied taking down her pants and inserting his hand or any other object inside her vagina. He fled to Mexico while awaiting trial because his father became ill. He was able to see his father before he passed away. Defendant did not return to California, but went to Arizona. He is 39 years old and he has three children with a woman he lived with in Arizona. When asked if it was true that the woman was 13 when he started dating her in Mexico, defendant responded: "This is different. We here to solve my daughter." He refused to answer any further questions about his Arizona family.

Verdicts, Romero Motion, and Sentencing

On October 23, 2008, the jury found defendant guilty of the two counts of aggravated sexual assault of a child under 14 by rape (§§ 269, 261, subd. (a)(2)).[5] The jury further found true the allegations that, prior to commission of the offenses, defendant had been convicted of violating section 288, subdivision (a). On January 20, 2009, defendant filed a request that the court strike the prior conviction. The People filed opposition to the request on February 27, 2009. Following a hearing on March 6, 2009, the court denied the request.

On April 10, 2009, the court sentenced defendant to prison for 60 years to life. The sentence consists of consecutive terms of 15 years to life on each of the two counts,

[5] Count 3 was not submitted to the jury.

doubled under the Three Strikes law. (§§ 667.61, subd. (b), 667, subds. (b)-(i), 1170.12.) The court dismissed count 3 on the People's motion.

DISCUSSION

Sufficiency of the Evidence

At the time of defendant's offenses, section 269 provided in relevant part: "Any person who commits any of the following acts upon a child who is under 14 years of age and 10 or more years younger than the person is guilty of aggravated sexual assault of a child: [¶] (1) A violation of paragraph (2) of subdivision (a) of section 261." (Former § 269, subd. (a)(1), Stats. 1994, 1st Ex. Sess. 1993-1994, ch. 48, § 1, p. 8761.) Section 261, subdivision (a)(2) stated in relevant part then, as it does now: "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] . . . [¶] (2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another."

Defendant contends that the prosecution failed to produce sufficient evidence to support a finding that the aggravated sexual assaults by rape were accomplished against P.'s will by means of force or duress. (§ 261, subd. (a)(2).) He argues that the record is devoid of any evidence showing that the application of physical force on P. was different from the sexual act itself, and that there was no evidence that P.'s participation was impelled by an implied threat. The People contend that the evidence is sufficient to prove that defendant used force and that the evidence is also sufficient to establish duress.

"[A]ppellate courts must review 'the whole record in the light most favorable to the judgment' and decide 'whether it discloses substantial evidence . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] Under this standard, the court does not ' "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." [Citation.] Instead, the relevant question is whether, after reviewing the evidence in the light most favorable

to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*People v. Hatch* (2000) 22 Cal.4th 260, 272.)

"Decisional law makes clear that the definition of the word 'force' in sexual offense statutes depends on the offense involved." (*In re Asencio* (2008) 166 Cal.App.4th 1195, 1200 (*Asencio*).) In *People v. Griffin* (2004) 33 Cal.4th 1015 (*Griffin*), at page 1027, the court stated: "The gravamen of the crime of forcible rape is a sexual penetration *accomplished against the victim's will* by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury. As reflected in the surveyed case law, in a forcible rape prosecution the jury determines whether the use of force served to overcome the will of the victim to thwart or resist the attack, not whether the use of such force physically facilitated sexual penetration or prevented the victim from physically resisting her attacker." That is, " 'force' plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim's will." (*Id.* at p. 1025.)

The question for the jury in this case was, therefore, "whether defendant used force to accomplish intercourse with [P.] against her will, not whether the force he used overcame [P.'s] physical strength or ability to resist him." (*Griffin*, *supra*, 33 Cal.4th at p. 1028; see CALCRIM No. 1000.) The evidence showed that the incidents at issue occurred when P. was five years old. Defendant is her father and is over 20 years older than P. Defendant came into the room, pulled down P.'s pants and his pants, placed a sandwich bag on his penis, lay on top of P., and put his penis in her vagina. She cried and told him that it hurt her, but he did not stop. Based on this evidence, a jury could reasonably conclude that defendant's age, size, relationship to P., positioning himself on top of her, and refusing to stop the sexual penetration when she cried and told him that he was hurting her, combined to constitute use of force to accomplish intercourse with P. against her will. (*Ibid.*)

Defendant argues that there is no distinction between the facts in *People v. Espinoz*a (2002) 95 Cal.App.4th 1287 and those in this case. In *Espinoza*, five different times the defendant entered his 12-year-old daughter's bedroom, sat on the bed, pulled her pants down, and rubbed her breasts and vagina. It was uncomfortable, and the victim was scared. However, she did not resist, and she did not say anything to the defendant. On one of the occasions he attempted to have intercourse, but the victim was able to move to prevent the defendant's penis from going inside her. (*Id*. at pp. 1292-1293.) The defendant was charged with lewd conduct and both forcible lewd conduct and attempted forcible rape. (*Id*. at p. 1295.) This court stated that there was no evidence presented at trial that the defendant used or intended to use force, and that the prosecutor expressly premised the forcible sex offense counts solely on duress. (*Id*. at p. 1319.) In contrast to the facts in *Espinoza*, in the case before us, the prosecution presented evidence that defendant lay on top of his daughter so that she could not move, he penetrated her vagina with his penis, and she cried and told him he was hurting her, but he did not stop. We find that this is sufficient evidence of forcible rape which distinguishes this case from *Espinoza*.

Even if we were to find that there was insufficient evidence to support a finding that defendant's aggravated sexual assaults were accomplished by force, we would find sufficient evidence to support a finding that the offenses were accomplished by duress. " ' "Duress" has been defined as "a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." . . . [D]uress involves psychological coercion. Duress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. . . . "Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim"

[are] relevant to the existence of duress.' (*People v. Schulz* [(1992)] 2 Cal.App.4th [999,] 1005 [(*Schulz*)] . . . .)" (*Espinoza*, *supra*, 95 Cal.App.4th at pp. 1319-1320; see CALCRIM No. 1000.)

In this case, P. was five years old when her father pulled down her pants, lay on top of her, and put his penis in her vagina. She cried and told him he hurt her but he did not stop. He told her not to tell anyone, especially not her mother. This frightened P. and her fear of defendant allowed him to sexually assault P. on repeated occasions. Thus, defendant took advantage not only of his physical dominance over P. to overcome her resistance, but also his psychological dominance. As this court did in *Schulz* and *Espinoza*, we find that this qualifies as duress. (*Espinoza*, *supra*, 95 Cal.App.4th at p. 1320; *Schulz*, *supra*, 2 Cal.App.4th at p. 1005.) Accordingly, we find that the prosecution presented sufficient evidence to support defendant's convictions for aggravated sexual assault of P. by rape.

Instruction on Lesser Included Offense

Defendant requested that the trial court instruct the jury on forcible and nonforcible lewd conduct (§ 288, subds. (a)&(b)) as lesser included offenses of aggravated sexual assault. The court declined to do so, finding that, "in this case on these facts, as a matter of law, they are not lesser includeds of that offense." Neither defendant nor the prosecutor requested any other instructions on lesser included offenses, and the court did not give any instructions to the jury on lesser included offenses.

Defendant now contends that the trial court erred in failing to instruct the jury sua sponte on battery as a lesser included offense. "Battery is a lesser included offense of rape. . . . Further, the offense of battery does not require proof [of] a level of force, violence, duress or menace beyond mere touching. . . . Thus, because there was a question of whether the prosecution had proved the element of force, violence, duress, or menace, the trial court was obligated to instruct on battery. The failure to do so was error." The People contend that the court did not have a sua sponte duty to instruct the

jury on battery as "the evidence was such that [defendant], if guilty at all, was guilty of the greater offense."

"A criminal defendant has a constitutional right to have the jury determine every material issue presented by the evidence, and an erroneous failure to instruct on a lesser included offense constitutes a denial of that right. To protect this right and the broader interest of safeguarding the jury's function of ascertaining the truth, a trial court must instruct on an uncharged offense that is less serious than, and included in, a charged greater offense, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged greater offense are present. [Citations.] [¶] But this does not mean that the trial court must instruct sua sponte on the panoply of all possible lesser included offenses. Rather, . . . ' "such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" ' that the lesser offense, but not the greater, was committed." ' [Citation.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 215.)

Battery is a lesser included offense of forcible rape. (*People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1636, disapproved on another ground by *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.) "A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242.) The evidence presented at trial could not support a finding that defendant was guilty only of the lesser offense of battery and not of the charged offense of aggravated sexual assault by rape. P. testified that defendant pulled down her pants, lay on top of her, and put his penis in her vagina. The only defense defendant asserted a trial was a complete denial of the alleged acts. Defendant denied pulling down P.'s pants and putting his penis, his hand, or any other object inside P.'s vagina. On this record, only two conclusions were supported by substantial evidence. The jury could have believed defendant and found that he committed neither

rape nor battery. Alternatively, the jury could credit P.'s testimony and find defendant guilty of aggravated sexual assault by rape. There was no middle ground in the evidence that could have permitted a jury composed of reasonable persons to conclude that battery, but not rape, was committed. Consequently, the trial court did not err in failing to instruct the jury on battery as a lesser included offense of the charged offense. (*People v. Huggins*, *supra*, 38 Cal.4th at p. 215; see also, e.g., *People v. Morrison* (1964) 228 Cal.App.2d 707, 712-713 [it is not necessary to instruct on lesser included offenses when the defendant denies any complicity in the charged offense].)

DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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DUFFY, J.